Supreme Court, U. S.
FILED
JUL 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-511

J. RAY McDERMOTT & CO., INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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July, 1978

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, J. Ray McDermott & Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on May 10, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix 1a) is not yet officially reported. The National Labor Relations Board's decision and order is reported at 227 NLRB 1347. (Appendix 21a.)

JURISDICTION

The decision of the Court of Appeals was entered on April 18, 1978 (Appendix 1a) and this petition for certiorari was filed within ninety (90) days of that date. A thirty (30) day stay of the Court of Appeals' judgment has been granted to permit the filing of this petition. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Did the National Labor Relations Board abuse its authority in certifying a union as the majority representative of a unit of employees while failing to count potentially decisive ballots which were actually cast in the representation election?

2. Does the "reasonable bounds" standard used by the Court below, which gave controlling weight to the "parties' interest in the finality" of Board election results, accord adequate consideration to the right of employees to select, by majority vote, their bargaining representative?

3. May the National Labor Relations Board bypass its own procedures for safeguarding the freedom of employee choice by changing the certified bargaining representative without an election?

STATUTES INVOLVED

Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended (61 Stat. 140, 29 U.S.C. Sec. 158), provide:

> Sec. 8. (a) It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) . . . .

For the convenience of the Court, a portion of Section 9(a) of the same Act (61 Stat. 143, 29 U.S.C. Sec. 159) is also set forth here:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purpose, shall be the exclusive representatives . . .

STATEMENT OF THE CASE

McDermott is engaged in the offshore construction business. In early 1974, the International Association of Professional Divers, affiliated with MEBA, AFL-CIO, filed a petition seeking representation of the Company's divers, tenders and rack operators. An election was held which was set aside by the Board because of union misconduct. *J. Ray McDermott & Co., Inc.*, 215 NLRB 570.

A second mail ballot election was held in February 1975 which is the one in controversy here. A total of

eighty-six (86) balloting kits were sent to eligible employees: thirty-nine (39) votes were cast for IAPD/MEBA; thirty-six (36) votes were cast against IAPD/MEBA; six (6) ballots were cast and challenged by the Employer; one (1) eligible employee had died; and one (1) employee lost his ballot return envelope and was unable to secure a replacement and to vote by the deadline. Three (3) employees' ballots, although timely mailed, were never received by the Labor Board. These are the only ballots at issue. Objections seeking to set aside the election asserted the obvious — the will of the majority could not be determined because of the failure to count the three valid ballots cast. The objections were overruled and the Union was certified as bargaining representative. Its request to bargain was rejected by the Employer in order to secure Court review of the certification.

Thereafter, in mid-July 1975, IAPD's leadership engineered a disaffiliation vote from MEBA which was followed immediately by a vote to affiliate with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. This new union, Local 1012, filed a petition to amend the certification to reflect an obligation by the Company to bargain with Local 1012 rather than IAPD/MEBA. The Company contended that the affiliation election should not be given effect because it failed to meet minimum standards reflective of true employee intent. The Labor Board, Member Walther dissenting, rejected the Company's contentions and granted the amendment without requiring a Board-supervised election. A new request to bargain was rejected by the Company. This refusal became the subject of the present refusal-to-bargain charge and

provided the appropriate vehicle for presenting both the original certification and the amendment of certification for judicial scrutiny.

The decision below concluded that the Company unlawfully refused to bargain with Local 1012. This conclusion, with respect to the original certification, was predicated upon "the parties' interest in the finality of the representation proceedings" and "that an election by mail is (not) *per se* invalid whenever a potentially decisive number of votes, no matter how small, is lost through the vagaries of mail delivery." It is upon this issue — an expedient certification which ignores outcome determinative ballots — that certiorari is sought.

With respect to the amendment of certification, the decision below held that the change in affiliation did not constitute a change in bargaining representative requiring a Board-conducted election. The Court below also found that sufficient safeguards of employee free choice were maintained in a union meeting attended by a minority both of Union and unit members. The transfer of certification issue meriting certiorari is two-fold: (1) whether the Labor Board may abdicate its statutory responsibility to resolve questions concerning representation and (2) whether private elections conducted by Union officers may be credited in circumstances which fail to provide an opportunity to consider and present competing viewpoints.

Thus, the facts of this case are simple and straightforward. The issue involved concerns the basic pur-

Steel Corp. v. N.L.R.B., 457 F.2d 660 (3rd Cir. 1972); and *N.L.R.B. v. Bear Archery, Division of Victor Comptometer Corporation*, ___ F.2d ___ (6th Cir. 1977). (Appendix 37a). The continued existence of such different standards on this issue impairs the uniformity of national labor policy that the Act was designed to achieve. Cf. *Garner v. Teamsters Union*, 346 U.S. 485, 490-491 (1953).

In *American Bridge*, the leadership of an independent union of 304 members held confidential discussions of possible affiliation with a representative of the 1,120,000-member United Steelworkers of America (USW). On September 22, 1969, a notice was mailed to all members of the independent union informing them of a membership meeting on October 5 for the purpose of voting on the affiliation. One of the members, evidently dissatisfied with the limited opportunity to discuss the various advantages and disadvantages of affiliation, requested a meeting in advance of October 5 to discuss the problem. Notwithstanding this request, no such meeting was held. On October 5, the leadership presented its views, and a USW representative spoke and answered questions. The USW representatives left the meeting, and balloting was conducted without a voting booth or any other guarantee of voting secrecy.

The Court observed that the comparative advantages and disadvantages of affiliation "were complex, requiring thoughtful consideration by everyone affected." 457 F.2d at 665. Employees' freedom of choice and opportunity to consider and secretly vote

on the question of affiliation were not protected. These factors persuaded the Third Circuit "that the procedures were deficient in providing a fair opportunity for the members to consider all the vital issues confronting them." 457 F.2d at 666.

By contrast, IAPD's leadership, without prior disclosure of their own dissatisfaction with MEBA to the general membership, sent a letter to members — most of whom were employed by other companies — dated July 7 advising them of a meeting on July 11 to discuss disaffiliation. No mention was made of any intent to affiliate with the Carpenters Union (UBC). Further, this letter effectively gave only three (3) days notice. Even that was greatly reduced considering the geographical dispersion of divers throughout the Gulf Coast and offshore. In fact, only one-third (1/3) of the membership attended the July 11 meeting. Only then did the general membership learn of their leadership's intent to affiliate with the UBC. A UBC representative attended the meeting and answered questions, while a MEBA representative unsuccessfully sought admittance. Various votes were taken with no semblance of voting secrecy. An attempt at curing these defects by a subsequent mail ballot election also failed.

In *Bear Archery*, the Sixth Circuit denied enforcement of a Board order, adopting Member Walther's dissent. The Court noted that he "dissented primarily because the election procedures did not provide the employees with an adequate opportunity for reflection and for the presentation of opposing viewpoints." Appendix 38a.

There, the Board majority characterized Walther's dissent as arguing that the affiliation election failed to meet minimum standards because (1) the employees were not given an adequate opportunity to discuss and consider the question of affiliation before voting; (2) the notice of the special meeting of the Board of Directors did not conform to the formal requirements of the association; (3) no impartial party was present during the election; (4) the polling area failed to assure secrecy of the ballot; and (5) about 30 probationary employees were not permitted to vote. Noting that the employees had ample notice of the special meeting and its purpose, as opposed to here, and, therefore, had an ample opportunity to discuss among themselves the issue of affiliation before the meeting, the majority stated that Member Walther's reliance upon *American Bridge* was misplaced. The majority made clear its primary thrust: "In any event, the important thing is that the employees had *advance notice of the purpose of their meeting.*" (Emphasis supplied.) 223 NLRB at 1171.

The facts in both *American Bridge* and *Bear Archery* represent superior vehicles for approving an affiliation election to those here, yet both the Third and the Sixth Circuits declined to do so. The conflict created by the Fifth Circuit requires this Court's granting certiorari to define the minimum requirements for such elections.

3. The Decision Below Conflicts With the Decisions of Another Court of Appeals on the Appropriateness of the Amendment of Certification Procedure.

The final compelling reason for granting certiorari stems from a conflict between the Fifth and Third Circuits on the appropriateness of the amendment of certification procedure.

In *American Bridge, supra*, the Court's primary concern was whether a Board-supervised election under Section 9 was required, or whether the amendment of certification procedure was permissible. The Labor Board had acknowledged a duty to conduct its own election when there is a "question concerning representation." Only the absence of a "question concerning representation," renders appropriate the amendment of certification procedure, predicated upon a union-run affiliation election. A situation presents no "question of representation" upon the concurrence of three conditions: (1) the certified union does not oppose the amendment; (2) the bargaining entity remains the same; and (3) the members of the union are given an opportunity to consider and vote on the question of affiliation through a democratic process. The second condition was not satisfied.

The Court concluded that the new union was something quite different from the earlier organization "because the people who conducted a substantial part of the unit's dealings with management are no longer the association's officers, and the power of the unit's members to control those agents has radically chang-

ed. In other words, there is a clear question of representation: Will the unit's members be represented by their own local officers or by the Steelworkers' Union?" 457 F.2d at 663.

Certain factors, identical in this case, were the touchstones of that decision: (1) the local union of 300 members was supplanted by an international union almost four thousand times larger and, (2) although the local officers remained the same, the rights of the parties had been changed by the creation of new rights vested in the international; *e.g.*, options to approve strikes and to assist in the adjustment of grievances.

In *N.L.R.B. v. Bernard Gloekler North East Co.*, 540 F.2d 197 (3rd Cir. 1976) an independent union had a bargaining agreement with the company which, under Labor Board policy, barred an election. During the term of the contract, a Gloekler employee contacted a representative of the United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), to explore the possibility of the Gloekler employees joining the UAW. An affiliation vote was conducted but the company refused to deal with the new union. The Court agreed with the company and found that the purported affiliation vote raised a question concerning representation which could not be addressed during the contract term.

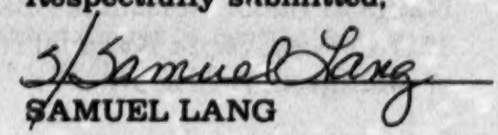
As in *American Bridge*, the Court was persuaded by the change in the previous local's structure, administration, assets, membership, autonomy and by-laws — factors common to the three cases. The company was faced with a new union with different

economic options and with a different locus of power. Consequently, the change in bargaining entity denied the efficacy of an amendment of certification and required, as the only available avenue, a Board-supervised election.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

In accordance with the provisions of Rule 33 of the Supreme Court rules, I certify that I have caused a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to be served on the following persons by mailing three copies of same via air mail, postage prepaid:

Mr. Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

and

Mr. Charles M. Paschal
Regional Director
National Labor Relations Board
Fifteenth Region
1001 Howard Avenue, Suite 2700
New Orleans, Louisiana 70113

This 6th day of July, 1978.

s/ Samuel Lang
SAMUEL LANG
COUNSEL FOR
J. RAY McDERMOTT
& CO., INC.

APPENDIX

J. RAY McDERMOTT & CO., INC.,
Petitioner-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

No. 77-1171.

United States Court of Appeals,
Fifth Circuit.

April 18, 1978.

Petition for Review and Cross-Application
For Enforcement of an Order of the
National Labor Relations Board.

Before HILL, RUBIN and VANCE, Circuit Judges.

RUBIN, Circuit Judge:

McDermott[1] petitions to set aside a decision of the NLRB holding that it has unlawfully refused, in violation of the National Labor Relations Act, §§ 8(a)(1) and 8(a)(5), to bargain with Local 1012,[2] the certified bargaining agent of certain of its employees, and ordering McDermott to bargain with that union.

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1 J. Ray McDermott, Inc.

2 Professional Divers Local 1012, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

McDermott contends that the order is invalid because (1) the Board's decision to certify the International Association of Professional Divers ("IAPD") as bargaining agent for all regular divers, tenders and rack operators in McDermott's Diving Division was invalid; (2) the Board's decision to amend IAPD's certification to name Local 1012 as bargaining agent was invalid; (3) Local 1012's unfair labor charge was time-barred under the National Labor Relations Act, § 10(b); and (4) McDermott entertained good faith doubt, at the time it refused to bargain, that the Local represented a majority of McDermott's employees. Because McDermott's arguments are not well-founded, we order that the Board's decision, in all respects, be enforced.

I.

On May 25, 1970, the International Association of Professional Divers, Inc. of Louisiana ("IAPD, Inc."), was incorporated as a not-for-profit corporation to further the interests of professional divers, primarily those operating off the Gulf Coast. An unincorporated association named the International Association of Professional Divers ("IAPD"), which had the same officers and the same members as the corporation, began to function as a labor organization for the purpose of organizing Gulf Coast divers and securing collective bargaining contracts that would further their interests.[3]

3 The IAPD's organizational structure is considered at Part III, B, *infra*.

Certification of the IAPD

On February 11, 1974, the IAPD entered into an agreement to affiliate with the Marine Engineers Beneficial Association ("MEBA"), a national union. The affiliation was later completed, and a formal charter was issued by District 2, MEBA.

In the spring of 1974, IAPD-MEBA petitioned for a representation election among McDermott employees. The local Regional Director of the NLRB ordered an election to be held in the early summer among all regular divers, tenders, and rack operators in McDermott's Diving Division. IAPD-MEBA won the election, but, upon the employers' objections, the NLRB set it aside. *J. Ray McDermott & Co., Inc.*, 1974, 215 NLRB 570.

In December, 1974, the Regional Director ordered a second election, which, like the first, was to be conducted by mail ballot. Balloting kits were subsequently sent to 86 eligible employees. As of the February 26, 1975 voting deadline, 39 votes were cast for IAPD-MEBA; 36 votes were cast against IAPD-MEBA; 6 ballots were cast and challenged by the employer; 1 eligible employee had died; 1 employee lost his ballot return envelope and was unable to secure a replacement and to vote by the deadline; and 3 employees' ballots were not received. These three each testified later that each had separately mailed a timely ballot. These three ballots could have affected the outcome of the election.

Primarily on the basis that these three ballots had not been received, the employer objected to certifica-

tion of IAPD-MEBA. The Regional Director, however, overruled McDermott's objections and, on April 18, 1975, certified IAPD-MEBA as exclusive bargaining agent for all regular divers, tenders and rack operators in McDermott's Diving Division. The NLRB affirmed his decision on June 30, 1975.

On July 3, 1975, Paul Woodhall, President of IAPD-MEBA, wrote to the Manager of McDermott's Diving Division on an IAPD, Inc. letterhead asking to start collective bargaining and requesting information pertaining to the anticipated negotiations. On July 10, 1975, the Division Manager informed Woodhall that McDermott would not furnish the requested information or bargain with IAPD-MEBA because McDermott disputed the validity of the union's certification. Woodhall reiterated the union's request by letter on July 21, 1975; the request was again denied on July 24, 1975.

Creation of Local 1012

On July 7, 1975, President Woodhall mailed notice to all IAPD members, including members working for employers other than McDermott, informing them that at the regular quarterly meeting to be held on July 11, 1975, the membership would consider a resolution to disaffiliate from District 2, MEBA, and the possibility of affiliation with "another international union." A separate notice was sent to the members in their capacity as shareholders of IAPD, Inc., informing them of a shareholders' meeting to be held at a later time on July 11, 1975, to consider dissolution of the corporation.

The meeting of IAPD-MEBA was held as scheduled. Only members of the union were admitted. Resolutions were offered to disaffiliate from MEBA and to transfer affiliation to the United Brotherhood of Carpenters and Joiners of America, AFL-CIO ("United Brotherhood"), to become Local 1012 of that union. Following discussion of the resolutions, a vote was taken by secret ballot. The results were 77 to 1 in favor of disaffiliation from MEBA, and 76 to 2 in favor of affiliation with the United Brotherhood. The meeting was adjourned, and the members reconvened as IAPD, Inc. shareholders, voting unanimously by show of hands to dissolve the corporation. Upon the adjournment of the corporate meeting, President Woodhall introduced a vice-president of the United Brotherhood, who presented the members with a charter for Local 1012.

As of July 11, 1975, IAPD-MEBA had roughly 200 members. The union's records do not indicate how many of the 76 voting to affiliate with United Brotherhood worked on July 11, 1975 for McDermott and how many worked for other bargaining units. The leadership of Local 1012, therefore, took steps in late July, 1975 to secure ratification of the affiliation transfer by a majority of employees in the McDermott Diving Division, both union and non-union, prior to seeking an amendment of IAPD's certification as bargaining agent of that unit. President Woodhall requested a list of all current employees from McDermott's Division Manager. The Manager denied Woodhall's request for such a list. The union then mailed balloting kits to 95 McDermott employees, whose names were gathered from the list of employees

as final notwithstanding one employee's inability to reach the polling place in time to vote. The Regional Director determined that, even though there uncounted ballots were timely cast and could have affected the outcome of the election, neither the Board, the union, nor the employer was responsible for the loss of the ballots.

The Regional Director properly weighed the competing interests before him. First, he properly concluded that the initial decision to hold the second representation election by mail was proper. The prior mail ballot had secured a high degree of participation. Because the employees involved worked a variety of shifts in scattered locations, a mail ballot was the only practical way to secure votes in a reasonable amount of time, and could best be expected to insure fairness and the broadest participation possible in the vote.

Further, the parties' interest in the finality of the representation proceedings was a substantial one. The difficulties in conducting a definitive poll among McDermott employees had already postponed collective bargaining for over a year after the union first petitioned for an election. It is reasonable for the Regional Director to have found that the election results, given all the relevant circumstances, adequately demonstrated that the majority of unit employees desired representation by the IAPD. He properly found that the election was conducted fairly, and that the non-receipt of the mail ballots was an "unplanned occurrence beyond the control of the parties, the Board, or the [voting employees]," *Versail Manufacturing, supra*, 212 NLRB at 593.

It cannot be said that an election by mail is *per se* invalid whenever a potentially decisive number of votes, no matter how small, is lost through the vagaries of mail delivery. Such a rule might unduly deter the use of mail balloting in cases like this in which a mail election, though less readily supervisable than a ballot box election, might prove more representative of, and fairer to, the voting employees.

We do not decide here that the decisions of the Regional Director and of the Board in this case were necessarily the wisest possible, or that, in future representation cases, the interests of the parties in finality shall always be deemed to overcome even occurrences beyond the parties' or the Board's control that prevent potentially decisive numbers of votes from being counted. We decide only that the balance struck by the Board in this case was reasonable. We are bound to regard the certification of the IAPD as valid.

III.

McDermott further asserts that the Board's decision in 1976 to amend the IAPD's certification to name Local 1012 as the McDermott employees' bargaining agent was invalid: first, because the Board erred in its conclusion that the transfer of affiliation was approved through proper democratic means; second, because the Board erred in concluding that Local 1012 was merely the continuation of IAPD under another name, rather than a new organization taking over the IAPD's certification without an election.

A.

McDermott's grounds are essentially those set forth in NLRB member Walther's dissent from the certification amendment decision, *Ocean Systems, Inc.*, 1976, 223 NLRB 857. It argues that (1) the notice to members of the impending vote was insufficiently specific, (2) members were not given sufficient notice for adequate debate and consideration prior to the meeting, (3) MEBA representatives were excluded from the meeting, (4) the meeting was conducted by officers already known to favor a transfer of affiliation, (5) members were presented with no alternative to the officers' resolutions, (6) insufficient time was provided at the meeting for discussion and debate, and (7) the voters approving transfer did not constitute a majority of the union.

We agree with the Board majority that the objections McDermott raises are either unsupported, irrelevant, or outweighed by other evidence of fairness in the election process.[4] What constitutes adequate notice or time for consideration of a particular issue can be judged only when all of the circumstances are considered. In the present case, the members received mailed notice that was not misleading and that complied with the by-laws and constitution of the corporation and of the unincorporated association. Over one-third of the union attended the quarterly meeting. Of

4 The Board's standard for review of affiliation transfer elections is set forth in *Hamilton Tool Co.*, 1971, 190 NLRB 571, 575.

> While the election procedures . . . may not measure up to standards the Board demands for its own elections, . . . [they were not] so lax or so 'substantially irregular' as to negate the validity of the election.

the 78 members voting, all but one approved disaffiliation from the MEBA, and all but two approved the transfer of affiliation. The record offers evidence of some discussion among the members; the absence of longer debate is as consistent with the conclusion of overwhelming membership agreement as with McDermott's offered conclusion that the result was railroaded through. The members' right to a secret ballot was adequately protected, and the majority of members voting, as well as the majority of employees in the bargaining unit, have offered no complaints or opposition to the transfer of affiliation. *Amoco Production Co.*, 1975, 220 NLRB 861.

The record clearly evidences the union leaders' support for an affiliation transfer, but that fact alone hardly invalidates the results of the meeting they chaired. *Hamilton Tool Co.*, 1971, 190 NLRB 571. The task of union leaders is to lead; they cannot be faulted for sponsorship of a particular program so long as their leadership is fair and protective of the union members' rights. The members here were presented with an obvious alternative to approval of the officers' resolutions, namely, disapproval. The election result is not suspect because non-members and MEBA representatives were excluded from the deliberations.[5]

5 McDermott also objects because only about two-fifths of the IAPD's membership voted on the transfer resolutions. So long as the absence of a majority of union members at an election cannot be attributed to unfair action by any party, it must be presumed that those who could have voted, but did not, assented to the will of the majority of those voting. *Cf., NLRB v. Singleton Packing Corp.*, 5 Cir. 1969, 418 F.2d 275, 279, *cert. denied*, 1970, 400 U.S. 824, 91 S.Ct. 47, 27 L.Ed.2d 53; *NLRB v. Whittier Mills Co.*, 5 Cir. 1940, 111 F.2d 474, 477; *North Electric Co.*, 1967, 165 NLRB 942.

The record in this case demonstrates overall fairness and substantial compliance with the union's own by-laws and constitution in contrast with those cases cited by McDermott in support of its position.[6] Considering the record as a whole, we do not find that the Board was unreasonable in concluding that the IAPD's members had sufficient time and opportunity to consider the proposed transfer of affiliation. We approve the Board's finding that no irregularity so infected the election process as to invalidate the election result.

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6 In *American Bridge Division, United States Steel Corp. v. NLRB*, 3 Cir. 1972, 457 F.2d 660, the court denied enforcement of a Board order granting an affiliation transfer, in part because the members were given insufficient time for debate and consideration of the transfer proposal. However, unlike the officers in the present case, the union leaders in *American Bridge Division* were presented in advance of the vote with a demand by a substantial group of dissenting members for a special meeting to consider reaffiliation without a vote being taken. The officers' refusal to hold such a meeting was manifestly unresponsive to the legitimate request of some members for extended debate. Here, the record reveals no such body of complaining dissenters, substantial or otherwise, before, during, or after, the transfer of affiliation. Thus, the union leadership cannot be charged with suppressing debate that the members desired.

In *NLRB v. Bear Archery*, 6 Cir. May 10, 1977, 95 LRRM 3094, the Sixth Circuit denied enforcement to a Board order granting a certification amendment, *Bear Archery*, 1976, 223 NLRB 1169, basing its denial on a dissent by Board member Walther substantially similar in principle to his dissent in this case. We note, however, without expressing our approval or disapproval of the Sixth Circuit's decision, that *Bear Archery* is distinguishable on its facts. In *Bear Archery*, some doubt was cast on the secrecy of the balloting process. Further, no discussion by the voting membership as a whole was held prior to the balloting. Voting members entered a room in which they could either proceed to vote in one corner, or, in another area, address questions concerning the affiliation transfer to the union president and to an officer of the proposed new affiliate union. In the present case, a full discussion was conducted by the membership, and no member of the United Brotherhood was present.

B.

Whether or not a merged union should continue to be considered the bargaining representative of a unit of employees depends on a factual determination — is it a continuation of the old union under a new name or is it a substantially different organization?

NLRB v. Commercial Letter, Inc., 8 Cir. 1974, 496 F.2d 35, 39.

This factual determination is for the Board to make initially. We are commanded in principle and by precedent not to re-examine its decision if it is supported by substantial evidence on the record as a whole. *NLRB v. Commercial Letter, Inc., supra; see also, Carpinteria Lemon Assn. v. NLRB*, 9 Cir. 1956, 240 F.2d 554, 557, *cert. denied*, 1957, 354 U.S. 909, 77 S.Ct. 1295, 1 L.Ed. 1427.

McDermott objects to the certification amendment on the ground that Local 1012 is not merely the IAPD with another name, but an altogether new and different bargaining agent. Virtually all of the differences McDermott cites, however, are differences not between the IAPD and Local 1012, but between the MEBA and the United Brotherhood. The record fails to show any substantial difference between the IAPD and its successor that would support the conclusion that Local 1012 is a genuinely different organization.

The factual determination at issue revolves not around superficial criteria such as the size of the

respective locals or organizational differences in the national unions of which they become a part. Rather, we must consider whether changes have occurred in the rights and obligations of the union's leadership and membership, and in the relationships between the putative bargaining agent, its affiliate, and the employer. *NLRB v. Pearl Bookbinding Co., Inc.*, 1 Cir. 1975, 517 F.2d 1108, 1111-1112.

Only one factor cited by McDermott as demonstrating a discontinuity in bargaining agents requires detailed review: McDermott urges that a break is manifested by the dissolution of IAPD, Inc. as an apparent prerequisite to the grant of Local 1012's charter, and by the continuing maintenance of IAPD, Inc.'s assets in a separate account pending the eventual liquidation of the corporation.

The significance of the corporate dissolution is unclear only because of confusion as to the relationship of IAPD and IAPD, Inc. Although counsel for McDermott conceded that the two were separate organizations and that the unincorporated association was the certified bargaining agent prior to April, 1976, all IAPD correspondence in the record with regard to union activities bears the letterhead, "International Association of Professional Divers, Inc." MEBA granted a charter to the union under its corporate name. IAPD is described in its agreement with MEBA as an "incorporated association," and the corporate name appears in the heading on the union's constitution. There is thus evidence to indicate that IAPD, Inc. and IAPD are not two organizations, but one; if that were so, then the dissolution of the corporation might

have substantially altered the legal relationships among the members, officers and the employer.

Substantial evidence, however, also supports the conclusion of the Board's majority that the bargaining agent has had a continuous, unbroken existence. First, a set of by-laws distinct from the union's constitution appears to have governed the organization's corporate incarnation. Second, President Woodhall's testimony before the NLRB suggests that the officers understood the organizations to be, and treated them as, separate. Finally, union and corporate meetings were convened and run separately, with separate notices of each sent to members, and separate minutes kept of each. These facts indicate that the IAPD was distinct from IAPD, Inc. and that only the unincorporated IAPD was the certified bargaining agent of McDermott's employees. Because only the unincorporated IAPD was the bargaining agent before April, 1976, the dissolution of IAPD, Inc. was not a significant change in the bargaining agent requiring us to view the non-corporate status of Local 1012 as a substantial change in the bargaining agent's structure.

There is also substantial evidence that the autonomy, dues structure, and leadership of the IAPD remained unchanged after July 11, 1975, despite its change in identity. IAPD members were required to file membership applications with the United Brotherhood, but acceptance was automatic. It appears that dues paid to the IAPD were considered good against obligations due the new Local 1012. Further, the United Brotherhood waived initiation

fees for six months, thus permitting a transfer of membership from the IAPD without additional financial obligations. The differences between the organizations are superficial; no presently functioning IAPD remains to contest the certification of Local 1012.

Consequently, we find that the certification amendment granted to Local 1012 by the Board was valid.

IV.

In addition to challenging the Board's decisions on their merits, McDermott contends that Local 1012's unfair labor charge filed on April 29, 1976, based on McDermott's refusal to bargain, was barred by the six-month statute of limitations provided under the National Labor Relations Act, § 10(b), because the employer's refusal to bargain on July 24, 1975 set the statutory limitations period running.

This circuit has twice held that each refusal to bargain by an employer under a duty to bargain is a violation of the employer's duty, and that the passage of more than six months' time from one such refusal does not bar action by the NLRB on a timely complaint based on a subsequent refusal. *NLRB v. Louisiana Bunkers, Inc.*, 5 Cir. 1969, 409 F.2d 1295, 1299-1300; *NLRB v. White Construction & Engineering Co.*, 5 Cir. 1953, 204 F.2d 950, 952-953. Our reasoning is not controlled by a conclusory labeling of the employer's duty or of his violation as a "continuing" one. Rather, we recognize that the primary purpose of the six-month rule is to assure prompt adjudications of disputes bas-

ed on fresh evidence. McDermott's refusal to bargain was based on motives contemporaneous with its refusal to bargain on April 21, 1976. The filing of a complaint on April 29, 1976 brought those motives into question, and was timely with regard to the unfair labor charge alleged. *Cf., Local Lodge 1424 v. NLRB*, 1960, 362 U.S. 411, 416-422, 80 S.Ct. 822, 4 L.Ed.2d 832; *NLRB v. McCready and Sons, Inc.*, 6 Cir. 1973, 482 F.2d 872.

V.

McDermott finally contends that its refusal to bargain in April, 1976 was justified because of the company's good faith doubt with respect to whether Local 1012 truly represented the majority of bargaining unit employees. This doubt was based on the alleged invalidity of pre-1975 representation; on a turnover of personnel at McDermott, including the departure of four persons in February, 1976, who had voted for the union; and, on Local 1012's alleged failure to demonstrate organizational strength in response to the company's recalcitrance.

These factors are insufficient to overcome the presumption of majority support that Local 1012 enjoys. During the first year following certification, a union enjoys an irrebuttable presumption of majority support. After that year, as in this case, the presumption is rebuttable and may be overcome by "objective evidence" proffered by an employer. *NLRB v. Newspapers, Inc.*, 5 Cir. 1975, 515 F.2d 334, 340-341. It is insufficient, however, that the employer merely intuits non-support; there must be convincing evidence.

Refusal to bargain may not be based on a combination of employee turnover and some anti-union complaints, *NLRB v. A. W. Thompson, Inc.*, 5 Cir. 1976, 525 F.2d 870, *cert. denied*, 1976, 429 U.S. 818, 97 S.Ct. 63, 50 L.Ed.2d 78, or on the termination of employment by a greater number of union adherents than the difference between the majority and minority votes in a representative election, *NLRB v. Gulfmont Hotel Co.*, 5 Cir. 1966, 362 F.2d 588. *Accord, Nazareth Regional High School v. NLRB*, 2 Cir. 1977, 549 F.2d 873. *See, NLRB v. Washington Manor, Inc.*, 6 Cir. 1975, 519 F.2d 750, in which the court held that a one hundred percent employee turnover during the term of a collective bargaining agreement, together with a close (27 to 24) representation election and alleged union inactivity, did not justify the employer's doubts as to the union's majority status "unaccompanied by objective evidence that new employees do not support the union," 519 F.2d at 753. The kind of "objective evidence" ordinarily sufficient to overcome a rebuttable presumption of majority support would be greater than fifty percent employee support for a decertification petition, *Automated Business Systems v. NLRB*, 6 Cir. 1974, 497 F.2d 262, or thirty percent support for decertification combined with other indicia of non-support, *National Cash Register Co. v. NLRB*, 8 Cir. 1974, 494 F.2d 189. The company's evidence falls short of these standards.

For the foregoing reasons, McDermott's refusal to bargain with Local 1012 in April, 1976 was unjustified and unlawful. McDermott's petition to set aside the Board's order is DENIED, and we direct that the order, in all respects, be ENFORCED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

J. RAY McDERMOTT & CO., INC.,
Petitioner,

versus No. 77-1171

NATIONAL LABOR RELATIONS BOARD,
Respondent.

JUDGMENT

Before: HILL, RUBIN and VANCE, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by J. Ray McDermott & Co., Inc., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on January 21, 1977, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on February 2, 1978, and has considered the briefs and transcript of record filed in this cause. On April 18, 1978, the Court being fully advised in the premises handed down its decision granting enforcement of the Board's Order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, J. Ray McDermott & Co., Inc., New Orleans, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. January 21, 1977

Howard Jenkins, Jr., Member

John A. Penello, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

MEMBER WALTHER, dissenting:

For the reasons previously expressed in my dissenting opinion in the underlying representation proceeding, *Ocean Systems, Inc.*, 223 NLRB No. 105 (1976). I dissent from my colleagues' finding of a violation herein.

Dated, Washington, D.C. January 21, 1977

Peter D. Walther, Member
NATIONAL LABOR
RELATIONS BOARD

JD-639-76
New Orleans, LA

DECISION

(Number and Title Omitted)

Statement of the Case

PLATONIA P. KIRKWOOD, Administrative Law Judge: This case was heard at New Orleans, Louisiana, on July 20, 1976, pursuant to a charge filed on April 29, 1976, by the above named union ("Union") against the above named company ("Respondent") and a complaint which issued on June 3, 1976. The case presents the following question:

> Did the Respondent violate Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive bargaining representative of the employees composing the unit described below?

Upon the entire record in the case,[1] including the post-hearing briefs filed by the General Counsel and the Respondent, and from my observation of the witnesses, I make the following:

Findings of Fact and Conclusions

I. The Business of the Respondent

Respondent is a Delaware corporation doing busi-

1 Underlying representation proceedings in Case 15-RC-5361 and 15-AC-28 (223 NLRB No. 105) were duly noted as an administrative and official matter during the hearing, as were the Board's findings, rulings and order in those proceedings. Official notice was (and is) also taken of the record in those proceedings as the term "record" is defined in Sections 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electro Systems, Inc.*, 166 NLRB 938, enf'd 388 F. 2d 683 (C.A. 4, 1968); *Golden Age Beverage Company*, 167 NLRB 151, enf'd 415 F. 2d 26 (C.A. 5, 1969); *Intertype Company* v. *Penello*, 269 F. 2d 573 (D.C., Va. 1967); *KFC National Management Company*, 204 NLRB 630; and Section 9(d) of the NLRA.

ness in the State of Louisiana, with its principal offices located in New Orleans, Louisiana. It is engaged in the general contracting, marine contracting, oil field construction and fabricating business. During the past 12 months, a representative period, Respondent purchased and received goods valued in excess of $50,000 directly from points located outside the State of Louisiana. During the same 12-month period of time Respondent shipped goods valued in excess of $50,000 directly to points outside of Louisiana. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that its interstate commerce operations meet the Board's discretionary jurisdictional standards.

II. The Labor Organization Involved

A prior determination by the Board in the underlying proceedings in Case 15-AC-28, 223 NLRB No. 105, and the credible evidence additionally adduced in this proceeding, establishes, and I find, that the Union is, and has at all times here relevant been, a labor organization within the meaning of Section 2(5) of the Act.[2]

2 Respondent disputed the status of the Union as a labor organization partially on grounds considered and rejected by the Board in the underlying amendment to certification proceeding. See 223 NLRB No. 105. As the Board's determinations and decisions are, of course, binding upon me, I would not countenance Respondent's efforts to attack the validity of the Board's rulings and decisions in the underlying proceedings in any way. Nor would I permit it or any other party to litigate at this hearing any matters which were or could have been litigated in the said prior representation proceeding. See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162; Rules and Regulations of the Board, Section 102.67(f) and 102.69(c).

In light of the Respondent's denial of the current status of the Union as a labor organization, I did permit Respondent, however, the opportunity to ask the Vice President of the Union a limited number of questions concerning the Union's activities as an employee representative at dates subsequent to the Board's decision in 223 NLRB No. 105.

III. The Alleged Unfair Labor Practices

A. *Background and Chronology of Relevant Events*

On April 18, 1974, the Regional Director of the Fifteenth Region of the National Labor Relations Board ("Regional Director"), issued a Decision and Direction of Election in Case 15-RC-5316 which involved the Company herein and the International Association, of Professional Divers, a/w District 2, MEBA, AFL-CIO ("IAPD"). The unit found appropriate by the Regional Director consisted of divers, tenders, and rack operators employed by the Company in its Diving Division excluding all other employees, free lance divers and tenders, shop employees, dispatchers, office clerical employees, shop clerical employees, guards and supervisors as defined in the Act. The election was conducted by mail ballot and a majority of those voting cast ballots for IAPD.[3] The Board however, set that election aside because of partially meritorious objections the Company had filed and ordered that a second election be conducted among the employees in the unit found appropriate by the Regional Director. 215 NLRB No. 104.

The second election was also held by mail ballot. The tally of ballots was served on the parties on February 27, 1975. It disclosed that of approximately 86 eligible voters, 39 cast ballots for, and 36 against, IAPD; and 6 cast challenged ballots. The Company filed objections to that election also.

3 The tally showed that of approximately 78 eligible voters, 40 cast ballots for IAPD, 33 cast ballots against IAPD, and 3 cast challenged ballots.

On April 18, 1975, the Regional Director issued a Second Supplemental Decision and Certification of Representative in which he overruled the Company's objections, sustained, 4 of the 6 challenges, found it unnecessary to resolve the 2 remaining challenges as they were no longer determinative, and issued a certification to IAPD. The Company then filed a request for review with the Board, and on June 30, 1975, the Board, by telegraphic order denied that request for review.[4]

On July 3, 1975, Paul Woodhall, president of the certified union, wrote Robert J. McGuire, the Company's division manager, to request information so as to prepare for negotiations and to suggest a meeting date for bargaining. By letter dated July 9, 1975, McGuire responded that the Union's requests were being considered. One day later, by letter of July 10, 1975, McGuire informed Woodhall that the Company did not believe that the Board's certification was valid and that the Company was consequently declining to bargain or to furnish information.

On July 21, 1975, Woodhall again wrote McGuire and requested the identical information requested in the July 3 letter. Additionally, Woodhall requested the current addresses of all divers, tenders, and rack operators then employed by the Company. By letter dated July 24, 1975, McGuire again refused to supply

4 On April 22, 1975, before the Request for Review was filed, IAPD wrote the Company requesting certain information. The Company replied by letter dated April 29, 1975, refusing the request and stating that a Request for Review of the Regional Director's Supplemental Decision and Certification would be filed.

the information and repeated the challenge of the certification's validity.

On September 10, 1975, the Union filed a petition to amend the above certification, so as to designate it in place of IAPD as the certified representative. The Employer opposed the petition. A hearing was then held, and on April 12, 1976, the Board granted the petition and ordered that the certification issued on April 28, 1975, *supra*, be amended by substituting the name of the Union for that of IAPD. 223 NLRB No. 105.

On April 15, 1976, Woodhall wrote to McGuire again requesting a negotiation meeting and suggesting certain specific dates. On April 21, 1976, McGuire replied stating that he would not meet with the Union, and asserting further that the Company not only questioned the validity of the certification and the amendment thereto but also that it did not believe the Union currently represented a majority of the employees in "any unit appropriate for purposes of collective bargaining."

B. *The Contentions of the Parties and Their Merits*

The complaint's relevant provisions allege in part that "commencing on or about July 10, 1975, and continuing to date, and more particularly on or about April 21, 1976, Respondent refused and continues to refuse to recognize and or bargain with the Union on behalf of employees composing the unit for which the Union holds the certificate of representative issued to it by the Board as above described." Respondent admits that, as alleged, it has refused to bargain with the

Union in July 1975, and in April 1976, and continues to refuse to bargain with it. Respondent maintains that, nonetheless, the complaint improperly describes its conduct to be an unfair labor practice within the meaning of Section 8(a)(5) of the Act. It rests this claim on the following contentions, each of which I consider, *seriatim*.

1st. *More than 6 months has expired since the alleged cause of action — i.e., the refusal to bargain — arose, and a complaint is therefore barred under the provisions of Section 10(b) of the Act.* Respondent claims, in this respect, that its refusal to bargain with the Union in July 1975 was unequivocal in nature and that the charge — filed more than 3 months later — was therefore time-barred.

I find no merit in the above contention. The undisputed facts establish that the Union made a bargaining demand on Respondent on April 18, 1976, which the Respondent admittedly refused to honor on April 21, 1976, and that the charge which initiated this proceeding was filed but 8 days later. Under well-established Board precedent, it is clear and I find that even though Respondent had rejected prior bargaining requests addressed to it, its new refusal to recognize and bargain with the Union provided the basis for an independent cause of action on which this complaint properly rests.[5] See, for example, *United States Gypsum Company*, 143 NLRB 1122, 1126, Note 6; *Strong Roofing and Insulating Company*, 152 NLRB 9, en-

5 A motion to dismiss the complaint on 10(b) grounds was made in Respondent's answer to the complaint and was denied by me at the hearing. I hereby reaffirm my ruling on that motion.

forced, 386 F. 2d 929 (C.A. 9), affirmed on other grounds, 393 U.S. 357.[6]

2nd. *The certification of representative in Case 15-RC-5361 and the amendment of certification in Case 15-AC-28 were invalidly issued.*

It is outside my province to rule upon the issues sought to be raised by this contention of Respondent. I accept the Board's decision and its ruling in the underlying representation and amendment to certification proceedings as correct and final.[7]

3rd. *Respondent's final contention is that its refusal to bargain on April 21, 1976 — 3 days after the expiration of the 1-year period following the Board's certification of the Union's status as the majority representative — was predicated on a good faith doubt of the Union's continued enjoyment of majority support.*

6 I am cognizant of the existence of some court decisions expressing a view contrary to that taken by the Board in applying its concept of 10(b) in cases involving successive refusal to bargain though not on facts precisely analogous to those in the case at hand. *N.L.R.B. v. McCready and Sons, Inc.*, 482 F. 2d 872 (C.A. 6), denying enforcement of 195 NLRB 28, cited by Respondent in its brief, is one such case. Decisions by other Circuits similarly holding are cited by the Sixth Circuit Court in its opinion in *McCready*. Assuming those court decisions provide support for the Respondent's argument it is clear that the Board's decisions do not. I am, of course, bound to follow the Board's decisions and rulings until the same are reversed by the Supreme Court. See *Prudential Insurance Agents*, 119 NLRB 768; *Ranco, Inc.*, 109 NLRB 998, 1009, fn. 8; *Lenz Co.*, 153 NLRB 1399.

7 Respondent may, of course, reiterate before the Board, its contentions concerning the correctness of the representation case determinations, and its position that evidence allegedly material to those determinations was not considered, inasmuch as the Board clearly has discretion both to reopen the case for the receipt of such evidence as Respondent wishes to proffer or, without reopening, to decide that its original determinations were wrong. But the Board's power and discretion to take such action does not permit me that latitude. I note, in this respect, that Respondent made no proffer of evidence newly discovered since the date of the Board's proceedings it here attacks.

Resolution of the issue raised by this contention of Respondent rests on well-settled principles of law. These principles were recently restated in *Bartenders Hotel, Motel and Restaurant Employer Bargaining Association of Pocatello Idaho*, and its Employer-Members, 213 NLRB 651. Quoting from an earlier decision — *Terrell Machine Company*, 173 NLRB 1480, 1481, enf'd 427 F. 2d 1088 (C.A. 4), the Board said in relevant part:

> It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues. This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees. Accordingly, once the presumption is shown to be operative, a *prima facie* case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful. The *prima facie* case may be rebutted if the employer affirmatively establishes either (1) that at the time of the refusal the union in fact no longer enjoyed majority representative status; or (2) that the employer's refusal was predicated on a good-faith and reasonably grounded doubt of the union's continued majority status. As to the second of these, i.e., "good faith doubt," two prerequisites for sustaining the defense are that the asserted doubt must be based on objective considerations and it must not have been advanced for the purpose of gaining time in which to undermine the union. [This second

> point means, in effect, the assertion of doubt must be raised "in a context free of unfair labor practices." See *Nu-Southern Dyeing & Finishing, Inc.*, 179 NLRB 573 fn. 1 (1969), enf'd in part 444 F. 2d 11 (C.A. 4, 1971.)][8]

To establish that its refusal to bargain with the Union on April 22, 1976, was predicated on a "good-faith and reasonably grounded doubt" of the Union's majority status on that date, Respondent relied on the testimony of Division Manager McGuire. According to McGuire, he arrived at a conclusion that the Union had not retained the support of a majority of the unit employees on the basis of a combination of the following objective facts: (a) the vote for union representation in the 1975 certification election exceeded the vote against representation by only a narrow margin (39 to 36); (b) only 52 of the 86 employees who were eligible to vote in the 1975 election still remained employed with the Company; (c) there were now 89 employees within the bargaining unit, an increase in the unit complement of 3 employees — and of these 89, 37 were newly hired since the conduct of the 1975 election: and (d) each of 4 employees who resigned his job in February 1976 (each of whom was promptly replaced by a newly hired employee) had advised McGuire at the time of resignation that he had voted for the Union.[9]

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8 Other cases similarly holding are set out in the able brief filed by General Counsel. Respondent's equally able brief recognizes the existence of these principles and their applicability as a means of testing the validity of the contention here being considered.

9 McGuire also testified about his subjective belief that the Board erred in finding that a majority of the unit employees in 1975 had voted for union representation. In so testifying, McGuire was not presenting any valid ground for the refusal to bargain but was reiterating a claim Respondent had unsuccessfully urged before the Board in the representation proceeding.

Reviewing the above evidence, it is plain that all that Respondent has proved with respect to the existence of an objective basis for its asserted doubt of the Union's majority status on April 21, 1976, is that, in the slightly more than 1-year period following the Board's conduct of the certification election, there had been an increase in the size of the unit of less than one half of one percent, and a turnover in unit personnel of approximately 52 percent. In accord with well established Board law, I find neither of these factors to be sufficient to support a conclusion that Respondent had a reasonably grounded and valid objective basis for doubting that the Union did not continue to enjoy the majority support among the unit employees, and for refusing, accordingly, to bargain with Union,[10] as it did, on April 21, 1976.

In light of all the foregoing findings, I conclude that, by virtue of Section 9(a) of the Act the Union, at all times here material was and now is the exclusive representative of the Respondent's employees in the appropriate unit as above-described, and that the Respondent, by its refusal to bargain with the Union on April 21, 1976, violated Section 8(a)(5) and (1) of the Act.

The Remedy

Having found that the Respondent has engaged in unfair labor practices proscribed by Section 8(a)(5) and (1) of the Act it will be recommended that Respon-

10 See and compare *King Radio Corporation*, 208 NLRB 578, 582, 583. *Terrell Machine Company*, 173 NLRB 1480, 1480-81, enf'd 427 F. 2d 1088 (C.A. 4, 1970), and the cases there cited.

dent be required to cease and desist therefrom and take certain affirmative action which I find necessary to effectuate the policies of the Act. Furthermore, having found that Respondent unlawfully refused to bargain with the Union as the exclusive bargaining representative in the appropriate unit described above, I shall recommend that it be ordered to do so upon request and if an agreement is reached to embody that agreement in a signed contract.

Upon the foregoing findings of fact and conclusions and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

Respondent J. Ray McDermott & Company, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to bargain collectively concerning rates of pay, wages, hours of employment or terms and conditions of employment with Professional Divers Local 1012 of The United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive representative of its employees in the following appropriate unit:

11 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

All divers, tenders, and rack operators employed by the Respondent in its Diving Division; excluding all other employees, free lance divers and tenders, shop employees, dispatchers, office clerical employees, shop clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights under the National Labor Relations Act.

WE WILL upon request recognize and bargain collectively in good faith with the above-named Union as the exclusive representative of the employees in the appropriate unit with respect to wages, hours and conditions of employment, and, if an understanding is reached, we will embody such understanding in a signed agreement.

J. RAY McDERMOTT & COMPANY, INC.
(Employer)

Dated _____ By _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Plaza Tower, Suite 2700, 1001 Howard Avenue, New Orleans, LA 70113. (Tel. No. (504) 589-6354).

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

LOCAL UNION NO. 1903, OF THE INTERNATIONAL UNION, UAW,
Intervenor,

versus

BEAR ARCHERY, DIVISION OF VICTOR COMPTOMETER CORPORATION,
Respondent.

No. 76-2041.

United States Court of Appeals,
Sixth Circuit.

May 10, 1977.

Application For Enforcement of an Order of the National Labor Relations Board.

Before WEICK and CELEBREZZE, Circuit Judges, and GREEN, District Judge.*

Full Text of Order

The National Labor Relations Board has petitioned for enforcement of its order finding the Bear Archery

* Honorable Ben C. Green, Senior District Judge, United States District Court for the Northern District of Ohio, sitting by designation.

Division of the Victor Comptometer Corporation in violation of Section 8(a)(5), (1) of the National Labor Management Relations Act for refusal to bargain with Local 1903 of the United Auto Workers.

The company's employees were represented by an independent union, the Bear Archery Employees' Association, which had been recognized as bargaining agent by the employer but which had not been certified by the Board. On September 10, 1974, a majority of employees voted to affiliate the Association with UAW and it became Local 1903. The company refused to bargain with the UAW, complaining that the affiliation election was not fairly conducted and that it did not comport with minimum due process. Two of the three-member panel of the Board rejected the company's contentions. Member Walther dissented primarily because the election procedures did not provide the employees with an adequate opportunity for reflection and for the presentation of opposing viewpoints.

After consideration of the record, briefs and oral arguments of counsel, we conclude that enforcement of the Board's order should not be granted for reasons stated by Member Walther in his dissenting opinion. Accordingly,

It is therefore ORDERED that the petition for enforcement of the NLRB's order be, and it hereby is, denied.

Bear Archery, Division of Victor Comptometer Corporation and Bear Archery Employees Association — Local No. 1903 of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Case 7-CA-11569

April 29, 1976

DECISION AND ORDER

By Chairman Murphy and Members Fanning and Walther

On August 14, 1975, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and Charging Party filed an answer to the Respondent's exceptions and brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

In late August 1974,[1] several employees of the Respondent, including the president and vice president of the Bear Archery Employees Association

1 All dates hereafter are in 1974 unless otherwise noted.

(herein called the Association),[2] met with a representative of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (herein called the UAW), to discuss the possibility of the Association affiliating with the UAW. The employees, at that time, decided that a meeting of the Association's board of directors should be held on September 4, to discuss the issue of affiliation with the UAW. Each member of the board of directors was, thereupon, personally asked by an officer of the Association to attend the special meeting and was informed that this would be a very important meeting. Of the 30 members of the board of directors, 29 attended the September 4 meeting and, after discussing the pros and cons of affiliation, voted unanimously by secret ballot to recommend to the members that the Association affiliate with the UAW and that a "special membership meeting" be held to vote on affiliation.

On September 5, notices were posted throughout the plant announcing a special association membership meeting, to be held at the American Legion Hall on September 10, for the purpose of taking a secret ballot vote on the issue of affiliation with the UAW. Because the employees were then working on three shifts, the notice also stated the time employees on each shift were scheduled to attend the meeting.

On September 10, the meeting and voting, by shifts,

2 Since 1973, the Respondent has recognized the Association, a noncertified independent labor organization, as the collective-bargaining representative of its production and maintenance employees. The Association's last collective-bargaining agreement with the Respondent expired December 1975.

took place at the American Legion Hall, the usual association meeting place. Each employee, upon entering the hall, was handed a piece of paper by the Association's vice president which contained the board of directors' resolution and recommendation in favor of affiliation. The employee was then told by the Association's president, Gary Swanson, that if he or she had any questions or comments before voting, he or she should go to another part of the hall, removed from the voting area, where about 200 chairs had been set up for the members' comfort. The Association's president repeated this statement a number of times so that all employees who entered the hall were aware of the opportunity for discussion. Subsequently, Swanson and the UAW representative, Walter Schultze, conducted a meeting in this area. During the first two voting shifts, all of the employees went to the discussion area, where they listened to Schultze and Swanson speak on the advantages of affiliation and asked questions. During the last shift, however, only about 20 of the approximately 200 employees participated in the meeting. The others went directly to the voting area to cast their ballots.

It is not clear how long the meetings lasted. However, at the conclusion of said meetings, each voter was directed to a table where the Association's secretary and treasurer checked to see if the employee's name was on the Employer's official seniority list which was used as the voter eligibility list. If the employee's name was on the list, he or she was given a ballot, the voter's name was checked off the list, and he or she was directed to a long table facing the wall about 20 feet away from the officers' table

where, back turned toward the officers, he or she would mark the ballot, fold it twice, and deposit it in a locked ballot box which was situated at the end of the officers' table. The ballot box was never removed from the table and was guarded at all times by either the Association's secretary or treasurer.

At 6 p.m., the polls were closed and the ballots were counted by a special committee of six employee volunteers which included officers and nonofficers of the Association. Of 519 eligible voters on the seniority list, 329 voted for, and 67 voted against, affiliation.[3]

The following day, September 11, Respondent was notified by letter from the association officers of the affiliation vote and the fact that the Association would henceforth be known as Local 1903 of the UAW. The letter expressly advised Respondent that all officers and functions of the Union would remain the same; that there would be change in the day-to-day relationship between the employees' designated representative and the Company; and that Local 1903 of the UAW would honor all existing contractual obligations between the Association and the Company. By letter to the Association dated September 13, Respondent stated that it would continue to recognize only the Association.

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3 While all of the Respondent's employees are named on the seniority list, together with their dates of hire, sec. 8 of the current collective-bargaining agreement between Respondent and the Association provides that "the first 90 days of employment shall be considered probationary and without seniority." The contract also contains a union-security clause requiring employees to join the Union after 90 days of employment. Because of these contract provisions, about 30 probationary employees were not permitted to vote. See discussion of this, *infra*.

Based on the foregoing, we agree with the Administrative Law Judge's finding that the affiliation election was valid and accurately reflected the wishes of the employees. Therefore, we also agree with the Administrative Law Judge's further finding that Respondent, by refusing to recognize and bargain with Local 1903 of the UAW, violated Section 8(a)(5) and (1) of the Act.

Unlike our dissenting colleague, we find that the affiliation election was conducted with sufficient procedural and substantial safeguards to insure a democratic vote, the results of which accurately reflected the wishes of the employee-members of the Association. Not a single employee in a unit of over 500 has been heard to complain that the election was other than fair and regular. It strikes us as odd, indeed, that only the Respondent Company and our colleague have come forward to attack the election procedures as denying employees their due process of law.

Our dissenting colleague argues that the affiliation election failed to meet minimum standards of due process because: (1) the employees were not given an adequate opportunity to discuss and consider the question of affiliation before voting; (2) the notice of the special meeting of the board of directors did not conform to the formal requirements of the Association's bylaws; (3) no impartial party was present during the election; (4) the polling area failed to assure secrecy of the ballot; and (5) about 30 probationary employees were not permitted to vote. We find that the above do not provide grounds for setting the election aside.

Our colleague states that there was no real opportunity for the members to discuss and consider the question of affiliation. This ignores the uncontroverted facts that all voters were given full opportunity to ask questions and make statements for or against affiliation before the voting began and that a majority of the employees on the first and second voting shifts took advantage of this opportunity. The fact that only about 20 of about 200 voters on the third voting shift took advantage of the opportunity for discussion cannot be construed as a denial of their right to such discussion. There is no testimony that any employee was denied the right to speak against affiliation. Moreover, the employees had ample notice of the special meeting and its purpose and, therefore, had an opportunity to discuss among themselves the issue of affiliation before the September 10 meeting. This is all that the Board or courts have required in the past. In light of the foregoing facts, we find our colleague's reliance on *American Bridge Division, United States Steel Corporation* v. *N.L.R.B.*,[4] and *Peco, Inc.*,[5] misplaced.

Thus, unlike the facts in the present case, in *American Bridge* 100 employees had signed a petition requesting a special meeting in advance of the affiliation election in order to discuss the issue fully, which request was denied by the officers of the incumbent association; neither a seniority nor membership list was used to determine eligibility or to check off the name of each employee who was handed a ballot and, thus, there was no way to insure that each employee

4 457 F.2d 660 (C.A. 3, 1972).

5 204 NLRB 1036 (1973).

received only one ballot; there was no designated voting area and members of the association marked their ballots wherever they desired; and members of the association, as well as officers, testified that they could and did, in fact, see how employee-members voted.

The facts in *Peco* are also strikingly different from those in the instant case. There, the incumbent association which was the certified representative of the production and maintenance employees conducted two separate membership meetings to vote on the question of affiliating with Marine Engineers Beneficial Association (MEBA). The first meeting, in February 1974, was held at a time which precluded attendance by all employees who worked the afternoon shift and, hence, only 20-30 employees or at best 30 percent of the membership attended and the election was admittedly not by secret ballot. The second meeting, held in September of that year, was attended by only 11 of the employer's approximately 100 unit employees. The 11 employees adopted an affiliation resolution and agreed to submit the resolution to the full membership for ratification. The president of the association, Jerry Winfrey, thereupon sent out ballots to all employees and a letter endorsing the "name change." Although 37 employees signed a petition requesting that a meeting be held to discuss this issue and although Winfrey agreed to hold this meeting and to stop the balloting, he continued with the referendum. Subsequently, at a meeting allegedly held for the purpose of discussing affiliation, the association president, without allowing the requested discussion, announced the results of the referendum stating that

the proposal to change the association's name had won.

The Board found that this affiliation procedure did not meet a minimum standard of due process on the grounds that (1) the association's president refused the employees' request for discussion; (2) many members apparently did not participate in the referendum because they believed the voting was discontinued pending a meeting to discuss the issue; (3) the September meeting at which the affiliation resolution was adopted by voice vote was attended by no more than 30 percent of the association's membership; (4) the association continued to exist after the affiliation referendum and, subsequently, signed a contract with the employer; (5) there was clear evidence that at least 37 members were dissatisfied with the election procedures and intervened in the Board action claiming that they had been denied due process; and (6) members who opposed affiliation were subsequently elected to a majority on the association's board of directors.

It is clear from the record that the employees here, unlike those in either *Peco* or *American Bridge*, had adequate opportunity to discuss and consider the question of affiliation before the voting began. The employees had ample notice of the meeting and its purpose and the polls were open throughout the day so that all employees had ample opportunity to attend the meeting and to vote. Both the UAW representative and the president of the Association were present at the meeting and all members were accorded an opportunity to raise questions or make comments for or

against the proposed affiliation. Thereafter, the election was conducted by secret ballot and, most significantly, no employee has objected to the procedures followed, challenged the validity of the election, or claimed that he or she was denied due process.

We also cannot agree with our colleague that the election was marred by irregularities merely because the special meeting of the Association's board of directors was not called in accordance with the formal requirements of the Association's bylaws, which require that notices of special meetings must be in writing and state the purpose of the meeting. We agree with the Administrative Law Judge's finding that the failure to give written notice of the special director's meeting was merely a technical deficiency which cannot be relied upon to overturn the election. In any event, this deficiency was cured by the facts that all 30 members of the board of directors were notified of the meeting and informed of its great importance; that all but 1 of the directors attended the meeting; and that the vote of the board of directors was unanimous in favor of affiliation and of calling a special membership meeting for the purpose of voting on affiliation. We note, too, that no member of the board of directors has protested the procedures used in calling the special meeting of the directors. As the Board stated in *The Hamilton Tool Company*, 190 NLRB 571, fn. 8 (1971), "the Board . . . does not normally concern itself with determining whether a membership meeting was held in strict conformity with a union's constitution and bylaws absent a clear showing . . . of substantial irregularity." See also *East Dayton Tool and Die Com-*

ly voted against affiliation, their votes would not have affected the results of the election which was overwhelmingly in favor of affiliation. As the Board observed in *Hamilton Tool Company, supra* at 575, under similar circumstances "when adequate opportunity to vote is provided to all those . . . eligible to vote, the decision of the majority actually voting is binding on all."

In conclusion, we find that while the procedures followed in the instant affiliation election may not have measured up to the standards the Board demands for conducting its own elections, we are unwilling to find that the procedures were so lax or so "substantially irregular" as to negate the validity of the election, especially in the absence of any complaint from an employee or member of the Association. In our opinion the vote accurately reflected the desires of the vast majority of the member-employees and we find no reason to require a Board-conducted election to redetermine the choice already made by the employees. Rather, we are satisfied that regular procedures under appropriate safeguards have been followed to determine the employees' wishes on the question of affiliation. We find that none of the arguments advanced by our dissenting colleague warrants setting aside the employees' wishes.

Accordingly, we agree with the Administrative Law Judge that Respondent by refusing to recognize that the Charging Party is the collective-bargaining representative for the production and maintenance employees has violated Section 8(a) (1) and (5) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Bear Archery, Division of Victor Comptometer Corporation, Grayling, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

MEMBER WALTHER, dissenting:

I do not agree with my colleagues' adoption of the Administrative Law Judge's finding that the Respondent violated Section 8(a) (5) of the Act by refusing to recognize the Charging Party following an affiliation election. In my view, the minimal standards of due process were not met by the circumstances surrounding the affiliation vote, and, hence, the Respondent did not violate the Act by refusing to honor the results of such a vote.

The record reveals that the bargaining unit employees were not given the opportunity to collectively discuss and consider the question of affiliation. Rather, each employee was presented with only the executive board's resolution favoring affiliation[8] and

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8 The resolution favoring affiliation was passed at a "special meeting" of the board of directors of the Bear Archery Employees' Association. However, contrary to the requirements of the Association's constitution and by-laws, there was no written notification of the special meeting nor were the board members informed in advance of the purpose of such meeting.

individually given the opportunity to question a representative of the UAW, the Union with whom affiliation was sought. No impartial party was present at any time during the voting procedure nor was there a "special membership meeting" as had been announced. Indeed, there was no membership meeting providing any opportunity for discussion in which questions or opposition could be expressed from the floor.[9]

The question of affiliation undeniably raises vital issues which affect the employees and require thoughtful consideration. Here, however, the voters were presented with only one side of the affiliation issue and voted immediately. Such an unbalanced presentation cannot qualify as an open discussion providing an opportunity for questions or dissent and consideration. And such an unbalanced presentation followed immediately by the voting surely had "an unwholesome and unsettling effect and tend[ed] to interfere with that sober and thoughtful choice which a free election is designed to reflect."[10] The Board sought in *Peerless Plywood Co., supra*, to eliminate

9 The balloting procedure cannot be characterized as a "meeting." Only 20 members out of 200 to 250 voting in the first shift heard the "speech" or discussion by the UAW representative; others voted after receiving only the resolution favoring affiliation. Similarly, some of the members voting in the remaining shifts did not hear the "discussion" by the UAW representative. Evidently a majority of voters did not take part in any discussion. In any event, such biased presentations to scattered groups of employees do not constitute a meeting, nor do such hit-or-miss conversations provide any opportunity for members to express opposition, even less to raise relevant questions before fellow members.

10 *Peerless Plywood Co.*, 107 NLRB 427 (1953).

such an unsettling effect by prohibiting last-minute speeches.

In *American Bridge Division, United States Steel Corporation v. N.L.R.B.*,[11] the court refused to enforce a Board bargaining order[12] which was based on an affiliation vote even though, unlike the instant case, the employees had been permitted to discuss the affiliation issue at a membership meeting just before the vote. The court said that a "period of reflection was certainly an element of the 'opportunity to consider' " an issue of such vital importance to the members. No such "period of reflection" was permitted here either.[13]

While internal union elections are, of course, not required to follow Board electoral procedures, due process requires that the basic safeguards of a free and fair election cannot be ignored it those elections are to serve as the basis for Board sanctions. As Member Jenkins observed in his joint dissent with Member Zagoria in *North Electric Company*:[14]

> If the Board is to accept privately conducted elections as a basis for amending Board certifications, it should be certain that minimal standards of due process be observed lest the very validity of Board certifications and elections be undermined.

11 457 F.2d 660, 666 (C.A. 3, 1972).

12 189 NLRB 119 (1971).

13 In making this finding, I need not and do not rely on any other portion of the Third Circuit's opinion in *American Bridge, supra*.

14 165 NLRB 942, 944 (1967).

As in *Peco, Inc.*,[15] wherein the Board refused to grant an amendment of certification because the members were not given an adequate opportunity prior to the vote to discuss the proposed name change, the members here were also denied the opportunity to discuss and consider the proposed affiliation. The procedures thus fail to meet the minimal standards of due process.

Further, the "election" was marred by other irregularities.[16] The vote, for example, was not in reality secret. The ballots were marked at an open table within feet of the officers of the Association who acknowledged their open support for affiliation. Often several employees marked ballots at the open voting table at the same time.

The facts put in the record by the General Counsel are clear and uncontradicted regarding the voting. All the activities took place in one room, 69-1/2 by 34 feet. In one corner was the only entrance used. Most of the voters came after leaving work, but the polls were open to stragglers all day. As voters entered, they were handed a copy of the executive board's resolution favoring affiliation and told they could ask questions or go directly to vote. Approximately 200 chairs were set up in the room and in the center at the far end the UAW representative and president of the Union sat,at a table to answer questions. The two officials of the Union checking the eligibility list stood next to them

15 204 NLRB 1036, 1037 (1973).

16 Approximately 30 unit employees were disenfranchised based on their status as "probationary employees."

behind another table which the potential voters faced, then turned with their ballots and walked a few feet to a table against the wall and voted openly for all to see. While one of the observers estimated she was 20 feet from the balloting, the room was only 34 feet wide. Within a space of at most 17 feet to the side of the two officials answering questions were the vote observers and tables. If the voting table was 3 feet wide and the observers only 3 feet from the speakers, this means ballots were marked openly at most 11 feet from the observers with other voters in between the tables or voting at the same time.

Clearly, this balloting procedure does not meet the requirement of a "secret ballot" as defined in section 3(k) of the Labor Management Reporting and Disclosure Act, 29 USC § 402(k).[17] The Department of Labor, charged with enforcing the secret ballot provisions with regard to internal union elections, interprets section 3(k) as requiring "that there be no possibility that any one would be able to determine how a member's vote was cast."[18] The balloting here falls far short of meeting this test.

17 Sec. 3(k) defines secret ballot as "the expression of a choice with respect to any election or vote taken upon any matter, which is cast in such a manner that the person expressing such choice cannot be identified with the choice expressed."

18 *American Bridge, supra* at 666, citing *Shultz v. Local 420 Aluminum Workers Union*, 74 LRRM 2281 (N.D.N.Y., 1970). My colleagues' argument that the question is whether the Department of Labor would approve the balloting here misses the mark. The provisions of sec. 3(k) provide a fair standard against which to measure the validity of the balloting in this case. The court in *American Bridge* was of this view, and applied the Department of Labor's "secret ballot" definition to a similar affiliation vote on which this Board had predicated its bargaining order, and concluded, *inter alia*, that the vote did not meet this test and refused to enforce the Board's bargaining order.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

J. RAY MCDERMOTT & CO., INC.
Employer
and Case No. 15-RC-5361

INTERNATIONAL ASSOCIATION OF PROFESSIONAL DIVERS, AFFILIATED WITH DISTRICT 2, MEBA, AFL-CIO
Petitioner

SECOND SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATION

Pursuant to a Decision on Review, Order, and Direction of Second Election issued December 13, 1974, by the National Labor Relations Board, a second election by mail ballot was conducted under the direction and supervision of the Regional Director for the 15th Region of the National Labor Relations Board, among certain employees of J. Ray McDermott & Co., Inc., (herein called Employer) to determine whether they wished to be represented for purposes of collective bargaining by International Association of Professional Divers, affiliated with District 2, MEBA, AFL-CIO (herein called Petitioner). Ballots were sent by United States mail to eligible voters from the Regional Office of the National Labor Relations Board on January 15, 1975, to be returned to this office no later than the close of business February 26, 1975. The tally of ballots served upon the parties immediately following the counting of the ballots on February 27, 1975, disclosed the following results:

As in *American Bridge*, *supra*, the voting procedures utilized in this case were deficient in providing a fair opportunity for the members to consider the vital issues confronting them. In my view, the procedure followed here could only have had a stifling effect on any employee inclined to oppose affiliation.[19] In the absence, therefore, of an opportunity for the unit employees to openly and collectively discuss and consider the impact of the proposed affiliation—and to cast truly secret ballots—I do not believe that the affiliation election can be accepted as representing the true desires of the unit employees. In these circumstances, I am unwilling to confer representative status on the basis of such an election and would not find that the Respondent violated the Act by refusing to recognize the Charging Party. Accordingly, I would dismiss the complaint in its entirety.

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19 The majority seems surprised that the Respondent and I should concern ourselves with defects in the affiliation election procedure when no employees have publicly objected. Frankly, it surprises me that after all these years it should appear odd to anyone that the Board, in the absence of employee objections, concerns itself with matters involving the propriety of election procedures. After all, due process is always a matter of Board concern.

This case arises out of a privately conducted election to determine what labor organization is to be the statutory bargaining representative of the employees. The Board is being asked, in effect, to enforce the election victory of the UAW. Through the years, the Board has consistently sought to guarantee that elections conducted under its auspices are run in accordance with the requirements of due process. At no point have employee objections been deemed to be a condition precedent to such an examination.

Approximate number of eligible voters	86
Void ballots	0
Votes cast for Petitioner	39
Votes cast against Petitioner	36
Valid votes counted	75
Challenged ballots	6
Valid votes counted plus challenged ballots	81

The challenged ballots are sufficient in number to affect the results of the election.

Employer on March 6, 1975, timely filed objections to the election, a copy of which was duly served upon Petitioner and a copy of which is attached hereto.

Pursuant to Section 102.69(c) of the Board's Rules and Regulations, Series 8, as amended, an investigation of the challenged ballots and objections has been conducted, during which both parties were afforded an opportunity to submit evidence bearing upon the issues. Having carefully considered the facts, the undersigned makes the following findings:

THE CHALLENGED BALLOTS

R. F. Andresakis, Stephen P. Wilson, Paul J. Simonette, Gerald P. Savoie, Mack Gabel, and *Paul Owen, Jr.*, were challenged by the Employer on the grounds they were no longer employed at the time they voted in the election.

The investigation disclosed that *R. F. Andresakis* was terminated by the Employer on or about January 6 or 7, 1975. Andresakis stated he mailed his ballot on or about January 22 or 23, 1975. The postmark on his

ballot was unclear, but the date stamp placed on it by the Regional Office indicates that it was received by the Region on February 3, 1975.

The investigation disclosed that *Stephen P. Wilson* was terminated by the Employer on or about January 6 or 7, 1975. Wilson stated he mailed his ballot on or about January 20, 1975. The postmark on his ballot was unclear, but the date stamp placed on it by the Regional Office indicates that it was received by the Region on January 21, 1975.

The investigation disclosed that *Paul J. Simonette* was terminated by the Employer on or about January 6, 1975. Simonette's ballot was postmarked January 19, 1975, and was received by the Regional Office on January 20, 1975.

The investigation disclosed that *Gerald P. Savoie* was terminated by the Employer on or about January 13, 1975. Savoie's ballot was postmarked on February 21, 1975, and was received by the Regional Office on February 24, 1975.

The termination of *Simonette* and *Savoie* became the subject of an unfair labor charge docketed as Case No. 15-CA-5601. After investigation, the undersigned, on March 19, 1975, dismissed said charge. The appeal period has expired with respect to said dismissal.

The termination of *Andresakis* and *Wilson* became the subject of an unfair labor practice charge docketed as Case No. 15-CA-5598. After investigation, the undersigned, on March 19, 1975, also dismissed this

charge. Thereafter, on April 8, 1975, Petitioner timely appealed the Regional Director's dismissal of the charge. However, on April 10, 1975, the Petitioner withdrew its appeal as it pertained to Andresakis. At the present time, no ruling has been received with respect to the appeal as it relates to Wilson.

As stated in *Plymouth Towing Company*, 178 NLRB 651, and cases cited therein, an employee is eligible to vote in a mail ballot election if he is employed when his ballot is cast, even if he is terminated before the ballots are counted. Since there are no charges pending to preserve the issue of their employment status, I find that Andresakis, Simonette, and Savoie were terminated prior to the time they mailed their ballots, were not employees of the Employer on these dates, and therefore were not eligible voters.

Accordingly, the challenges to the ballots of *Andresakis, Simonette,* and *Savoie* are sustained.

The investigation disclosed that *Mack Gabel* was terminated by the Employer on January 13, 1975. Gabel stated that he mailed his ballot on February 16, 1975. Thus, Gabel was not an employee of the Employer at the time he mailed his ballot, and therefore was not an eligible voter.

Accordingly, the challenge to the ballot of *Gabel* is sustained.

The investigation disclosed that *Paul Owen, Jr.*, was terminated by the Employer on January 6, 1975. Owen stated that he received his ballot on January 16, 1975,

and mailed it on or about January 18 or 19, 1975. Owen's ballot was postmarked on January 24, 1975, and was received by the Regional Office on January 27, 1975.

The termination of *Owen* by the Employer became the subject of an unfair labor charge docketed as Case No. 15-CA-5565. After investigation, the undersigned, on February 18, 1975, dismissed said charge. Petitioner thereafter timely appealed the Regional Director's dismissal of the charge. To date, no ruling has been made with respect to said appeal.

It is directed that the challenges to the ballots of *Paul Owen, Jr.*, and *Stephen P. Wilson* not be resolved and that they remain uncounted since they are no longer determinative of the outcome of the election.

THE OBJECTIONS

Objections Nos. 1, 2, 3, 4, and 5:

The Employer failed to present any evidence in support of these objections and none was adduced during the investigation.

Accordingly, the Employer's Objections Nos. 1, 2, 3, 4, and 5 are overruled in their entirety.

Objection No. 6:

The language set forth in the Employer's Objection No. 6 is too vague, general, and imprecise to meet the requirements of the Board's Rules and Regulations

home addresses (except the overseas voters). The fact that 76 ballots were timely received in the first election out of 78 eligible voters clearly demonstrates the feasibility of mail balloting and demonstrated that ballots mailed to the employees' home addresses with sufficient time for return accomplished the desirable objective of having a very large percentage of the voters cast ballots.[1] The success of this first election in that respect, and the fact that the situation was substantially unchanged prior to the rerun election, was clear indication that mail balloting in the same manner as before was satisfactory. Hence, the procedure in the rerun election was substantially the same as in the first election. Therefore, the Regional Director, within his discretion and after careful consideration, conducted the balloting by mail.

The Board has frequently recognized that certain exigencies require departure from the normal manual balloting procedure and has permitted the Regional Director's "broad discretion in arranging the details of an election, including in appropriate instances, the determination as to whether to conduct the election in whole or in part by mail." *North American Aviation*, 81 NLRB 1046, 1047; *Matter of E. I. DuPont de Nemours and Company*, 79 NLRB 345. In view of all the above considerations, I find that in this instance, mail balloting was fully justified.

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1 It should be noted that in this rerun election 81 ballots were received out of a total of 86 eligible voters. The bulk of remaining uncast ballots is the subject of Objection No. 8, *infra*.

Objection 7(b) - Mail Balloting Did Not Insure a Secret Ballot:

The Employer furnished no evidence in support of this objection and no evidence was discovered that the secrecy of the ballot was disturbed.

As no evidence was presented that the secrecy of the ballot was impaired, it can only be assumed that the Employer attacks the nature of mail balloting in general as violative of the secrecy of the ballot. This issue is hardly novel and was laid to rest by the Board in *Groendyke Transport, Inc.*, 154 NLRB 1040, and *Continental Bus System, Inc.*, 104 NLRB 599. I therefore find the secrecy of the ballot was not impaired.

Objection 7(c) - Employees Who Did Not Understand the Voting Procedures or the Ballot Were Not Afforded an Opportunity to Receive Verbal Explanation from a Board Agent:

There was no evidence produced or discovered that any voter needed or desired verbal explanation from anyone. There were no void or spoiled ballots. Furthermore, this being a rerun election, many employees were knowledgeable as to the procedure. Also, election notices had presumably been posted, and each voter received a copy of the Board's official Notice of Election *and* an individual explanatory notice along with his mail ballot kit. These instructions have been drafted with due consideration of the election procedures and the "laboratory conditions" desirable in Board conducted elections. It is difficult to

comprehend under these circumstances how any voter could fail to understand the procedure. Additionally, neither party to the election nor any of the voters indicated prior to the election, or subsequent thereto, that the procedure or ballot was misunderstood. I therefore find no indication whatsoever that anyone misunderstood or failed to understand the procedure or the ballot.

Objection 7(d) - Mail Balloting Did Not Preserve the Secrecy of Those Who Did and Did Not Vote:

The parties to the election were entitled to know that the mail ballots being counted were received from eligible voters. This is a timetested and approved manner of balloting. Though procedurally different than manual balloting, the result is similar as to identity of who votes, since in the manual balloting, parties are entitled to, and do normally have, observers who represent them at the polls and check off the names of voters. The Board and the undersigned presume that parties to the elections will: (1) not maintain a list or attempt to determine for any future use who did or did not vote; (2) if any party does keep such a list, either physically or mentally, no adverse action will be taken against those who did or did not vote for that reason; (3) no benefit will be given to those who did or did not vote; and finally, (4) actions set out in (2) and (3), *supra*, could be unfair labor practices under certain conditions. I therefore find that if secrecy of those who voted was not preserved, it is not a basis for setting aside an election.

Objection 7(e) - Mail Balloting Did Not Afford Privacy of Voting Booth:

A mail balloting kit provides a voter with all information necessary to cast his ballot for the choice he deems appropriate. The instructions clearly advise the voter it is to be secret. Therefore, in the absence of evidence of any alleged lack of privacy, I find this objection is no basis for objection; see Objection 7(b), *supra*.

Objection 7(f) - Mail Balloting Caused Uncertainty and Irregularities:

There was no evidence furnished or discovered to support this objection; therefore, no basis exists for setting aside the election based on this objection.

Based on all the above, the undersigned concludes that Employer's Objection No. 7 raises no substantial or material issue with respect to the election or conduct affecting the results of the election. Accordingly, Employer's Objection No. 7 is overruled in its entirety.

Objection No. 8:

The Employer asserts in Objection No. 8 that a number of eligible employees, sufficient to affect the outcome of the election, received, marked, and mailed their ballots to the Regional Office in time to be received by the February 26, 1975 deadline, and these ballots were either never received by the Regional Office or were received and not counted.

In support of its position, the Employer presented two witnesses, a statement taken from an employee, and a copy of a telegram it received from another employee, all of whom were unit employees at the time of the election. Three of the four employees involved allegedly received, marked, and mailed their ballots to the Regional Office. The fourth employee allegedly lost the return envelope for his ballot but requested another one from the Regional Office which he never received.

Employee A stated that on or about January 28, 1975, he discovered his ballot in the mail after returning home from working offshore, and that he marked his ballot and deposited it in the mail on or about January 30, 1975. Employee B stated by telegram that he received his ballot on January 15, 1975, whereupon he marked the ballot and deposited it in the mail on the same day. Employee C stated that he received an election package on or about January 20, 1975. According to Employee C, he deposited his ballot in the mail on or about January 30, 1975.

Employee D stated that he received his ballot on or about January 15, 1975,[2] after returning home from offshore. According to Employee D, he was sent back offshore approximately two days later. Employee D stated that he took the mail ballot with him offshore and through some mishap lost the return envelope for the ballot. Employee D informed the lead diver of the loss of the return envelope. The lead diver told

2 Employee B and D probably are mistaken about these dates since the mail ballot kits were mailed from the Regional Office on January 15, 1975.

Employee D that he would notify the Employer's office about the matter. Employee D remained offshore approximately six to eight weeks and did not return home until around the first of March, 1975. Employee D stated that upon returning home, his mail did not contain a return envelope from the Regional Office.

The Regional Office mailed out 86 mail ballot kits on January 15, 1975. A total of 81 ballots were returned to the Regional Office on or before the February 26, 1975 voting deadline. No ballots were received by the Regional Office after the alloted voting period. Several employees, either directly or through the Employer, notified the Regional Office of the necessity for new mail ballot kits and they were mailed out to these employees on the same day of their request.

On January 28, 1975, the Regional Office was notified by one of Employer's officials that Employee D needed a new return envelope[3] and another one was mailed to Employee D at his permanent home address on the same day.

In determining whether circumstances preventing employees from voting are sufficient to require a new election, the Board follows the general rule that the circumstances must be within the control of one of the parties to the proceeding or must arise out of unfairness in the scheduling or mechanics of the election. *Versail Manufacturing, Inc.*, 212 NLRB No. 85. In the present case, it is obvious that Employee D was not prevented from voting by the parties to the proceed-

3 The official also notified the Region on January 28, 1975, that an employee in the unit died.

ing. Employee D received his ballot kit on or about January 15, 1975; and if he had chosen to do so, he could have marked and mailed the ballot on the same day. Instead, Employee D returned offshore two or three days later taking the mail ballot kit with him where he inadvertently lost the return envelope. The Regional Office, upon being notified of Employee D's need for a new return envelope, mailed one to his permanent address as listed on the *Excelsior* list. Assuming *arguendo* that the new return envelope arrived in the mail at Employee D's home, he did not return from offshore until around the first of March 1975, which was after the mail ballot deadline.

Also, beyond the control of the parties was the disappearance of the ballots of Employees A, B, and C. Although it is hard to imagine that the Post Office could have lost the ballots of these employees, it is, of course, possible. Other possibilities are that the ballots were not, in fact, mailed or that the employees' carelessness in the method of mailing caused them to be lost before the Post Office obtained possession. Nevertheless, regardless of what happened to the ballots, it is obvious that their disappearance was not due to any action or inaction by the parties, nor was it due to unfairness in the scheduling or mechanics of the election. See *Versail Manufacturing, Inc., supra.*

Based on the above and the fact that there must be some finality to the results of an election, I find that the failure of Employees A, B, C, and D to register their votes in the election was due variously to employee carelessness and inaccessibility, and to possible vagaries in the U. S. Postal Service. Neither of these

factors was attributable to either the parties or the Regional Office. It is therefore concluded that Employer's Objection No. 8 raises no substantial or material issue with respect to the election or conduct affecting the results of the election.

Accordingly, Employer's Objection No. 8 is overruled in its entirety.

CONCLUSION AND ORDER

For reasons herein-above set forth:

IT IS CONCLUDED that the challenge to the ballots of *Andresakis, Simonette, Savoie,* and *Gabel* are sustained. The challenge to the ballots of *Paul Owen, Jr.,* and *Stephen P. Wilson* are no longer determinative and no disposition will be made with respect to them.

IT IS FURTHER CONCLUDED that Employer's Objections Nos. 1, 2, 3, 4, 5, 6, 7, and 8 do not raise substantial or material issues affecting the election, and they are hereby overruled.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that International Association of Professional Divers, affiliated with District 2, MEBA, AFL-CIO, has been designated and selected by a majority of employees of J. Ray McDermott & Co., Inc., in a unit consisting of:

> Divers, tenders and rack operators employed by the Employer in its Diving Division; ex-

cluding all other employees, free lance divers and tenders, shop employees, dispatchers, office clerical employees, shop clerical employees, guards, and supervisors as defined in the Act.

The aforesaid organization is the exclusive representative of such employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.[4]

Dated at New Orleans, Louisiana, this 18th day of April, 1975.

/s/ Fred A. Lewis
Fred A. Lewis
Acting Regional Director,
Region 15
National Labor Relations Board

Plaza Tower Building,
Suite 2700
1001 Howard Avenue
New Orleans, Louisiana 70113

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4 Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Second Supplemental Decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by May 1, 1975.